Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

79-1891

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
*Petitioner*

V.

MICHAEL J. PAPRSKAR,
*Respondent*

* * *

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner State of Texas respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 3, 1980.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is *Paprskar v. Estelle*, 612 F.2d 1003 (5th Cir. 1980), and appears in the Appendix at A. 1. The unpublished judgment and order of the United States District Court of the Southern District of Texas, Houston Division, are reproduced at A. 13-14. The recommendation of the United States Magistrate that was adopted by the district court is reproduced at A. 15-17.

## JURISDICTION

The judgment of the United States Court of Appeals

in *Paprskar v. Estelle* was entered on March 3, 1980. This petition for writ of certiorari was filed within ninety days after final judgment. Hence, this Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether Rule 9 of the Habeas Corpus Rules or 28 U.S.C. §2244 provide a defense in federal habeas corpus against this classic case of abusive piecemeal litigation by a state prisoner?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244:

> . . .(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such a person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Rule 9(b), Rules Governing Section 2254 Cases in the United States District Courts, *foll.* 28 U.S.C. §2254:

> (b) Successive petitions. A second or successive petition may be dismissed if the

judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

## STATEMENT OF THE CASE

Respondent Paprskar is an inmate of the Texas Department of Corrections serving concurrent sentences of twenty years for two brutal and senseless murders. He pleaded guilty to both murders on April 9, 1973. A third conviction for the murder of a four year-old child--the son of a man who allegedly had sold bad heroin to Paprskar--was reversed on direct appeal by the Texas Court of Criminal Appeals in 1972, and his death sentence was accordingly vacated. Thus, "As a matter of ultimate fact, Paprskar was sentenced to twenty years for three murders." *Paprskar v. Estelle*, 612 F.2d 1003, 1008 (5th Cir. 1980)(concurring opinion of Coleman, C.J.); A. 11.

Apparently dissatisfied with his "unusually mild sentence" upon his plea of guilty (*id.*), Paprskar on December 17, 1975, filed an application for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division, claiming his right to good conduct time credit for his pretrial incarceration. At the time the matter was set for an evidentiary hearing on July 22, 1976, he had exhausted his state remedies as required by 28 U.S.C. §2254, on the good time claim, but not on the claims* he would later

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* Paprskar would later allege that his guilty pleas were involuntary because drugs were administered to him prior to his guilty plea, that he was denied the right to a speedy trial, and that failure of the State to provide certain evidence upon timely motion for discovery denied him his right to due process of law.

raise in his second federal habeas application attacking the constitutionality of his convictions, eventually filed in the same court in 1978.

It is significant that Paprskar was represented by the *same* attorney in *both* federal proceedings. At the time of the evidentiary hearing on the good time claim, that attorney elected not to raise any challenged to the *validity* of his client's convictions because he had not yet exhausted his state remedies upon those claims. Under the extant law in the Fifth Circuit, the presentation of any unexhausted claim would have required the entire habeas case to have been dismissed.

The district court granted relief upon the pre-trial incarceration good conduct time credit claim on September 16, 1976. The Fifth Circuit reversed on appeal, *Paprskar v. Estelle*, 566 F.2d 1277 (5th Cir. 1978), and this Court denied a petition for writ of certiorari on October 2, 1978, *Paprskar v. Estelle*, ____U.S.____, 99 S.Ct. 136 (1978).

Paprskar's second federal habeas application was filed on March 19, 1978. The State of Texas pleaded abuse of the writ, focusing upon Paprskar's conscious decision to litigate in a piecemeal fashion by rushing to judgment on his good time claim instead of waiting until he had exhausted his state remedies upon *all* his challenges to the fact or duration of his confinement. Texas argued that Paprskar's conduct could not reasonably be characterized as anything other than "deliberate withholding" of grounds for relief.

The district court agreed, concluding that Paprskar's conduct amounted to a "classic case" of abuse of the writ (A. 17). But the Fifth Circuit Court of Appeals disagreed, opining that well-established federal policies prohibiting piecemeal litigation in habeas corpus do not apply when one of several claims becomes "ripe for adjudication" by virtue of having been brought before the others. (612 F.2d at 1006-07; A. 8).

This petition for writ of certiorari followed.

## REASONS FOR GRANTING THE WRIT

I. This Case Presents a Significant Opportunity to Establish that the Federal Habeas Courts are not Required to Tolerate Abusive Piecemeal Litigation by State Prisoners.

II. This Issue is one of Increasing National Importance.

## ARGUMENT

I. This Case Presents a Significant Opportunity to Establish that the Federal Habeas Courts are not Required to Tolerate Abusive Piecemeal Litigation by State Prisoners.

The federal district court found in this case that Respondent Paprskar's conduct presented a "classic case" of abuse of the writ of habeas corpus. (A. 17). On appeal to the Fifth Circuit, Chief Judge Coleman, concurring reluctantly in the result, lamented that "*in the prsent state of habeas corpus law*, the judgment of the District Court must be vacated and remanded." (612 F.2d at 1008; A. 10)(emphasis in original). If that statement was correct, then this Court should change the present state of the law, although Petitioner believes there is ample authority already for upholding the district court's findings.

First, Rule 9(b), Rules Governing Section 2254 Proceedings in the United States District Courts, *foll.* 28 U.S.C. §2254, provides that a second habeas petition "may be dismissed if the judge finds . . . that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Second, 28 U.S.C. §2244 provides the same remedy where the "judge is satisfied" that the petitioner has "on the earlier

application deliberately withheld the newly asserted ground or otherwise abused the writ."

Third, this Court's prior case law sheds much light on the deliberate withholding of grounds for habeas relief. In *Sanders v. United States*, 373 U.S. 1 (1963), the Court stated that the allegation of abuse is open to the State in recognition of the fact that habeas corpus has been traditionally governed by equitable principles, among which is that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks..." *Sanders* at 17, *citing Fay v. Noia*, 372 U.S. 391 (1963):

> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one *or for some other such reason*, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay. (Emphasis added.)

The equitable principles developed in *Fay v. Noia*, which deal with the circumstances under which a prisoner may be foreclosed from federal collateral relief, govern the trial court's determination of abuse. *Id.* The focus of *Sanders* and *Fay* is the element of bad faith present when a petitioner exploits the collateral attack process afforded by 28 U.S.C. §2254. Thus, in *Fay v. Noia* at 439, the Court said:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to indicate his federal claims in the state courts, *whether for strategic*,

> *tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures*, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits--though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. (Emphasis added.)

Paprskar has exhibited the precise kind of behavior to which the abuse doctrine is addressed. He does not allege that the grounds he withheld from his first petition were based on newly-discovered evidence, or that he was unaware of the facts of his case or that he did not know that they constituted a basis for relief at the time of his original filing. *Cf. Price v. Johnston*, 344 U.S. 266, 292 (1948); *Johnson v. Coppinger*, 420 F.2d 395 (4th Cir. 1969); *Juelich v. United States*, 403 F.2d 523 (5th Cir. 1968).

Instead, he advances two reasons why his conduct is not abusive. The Court of Appeals found one persuasive: that ordinary policy considerations against piecemeal litigation are inapplicable where the second federal application is based on claims that were unexhausted at the time the first application is filed and decided, *regardless* of whether the unexhausted claims were known to the habeas petitioner throughout his legal peregrinations. As the Court of Appeals insisted, "The simple fact is that the 'good time' case was ripe for adjudication and the claims challenging the underlying conviction were not." 612 F.2d at 1006-07; A. 8.

Petitioner concedes that some of Paprskar's claims were ripe for adjudication and some were not; the argument focuses on *why* the latter claims were not yet ripe. The plain reason is that Paprskar had not only failed to exhaust state remedies on those claims, but persisted in pursuing his other claims *before* taking the

simple expedient of exhausting all his claims so that they might be resolved in one federal proceeding.

The Court of Appeals would have conceded that if a habeas petitioner exhausts two grounds for relief in state court and then brings several federal petitions, he is guilty of Rule 9(b) abuse. Yet the court held that if the same habeas petitioner purposely exhausts only one ground and files one federal petition, then if unsuccessful, exhausts the other ground and brings a second successive federal petition, he cannot be guilty of Rule 9(b) abuse. If one of these procedures is less abusive than the other, the distinction escapes Petitioner.

In this case, Paprskar's counsel made the strategic and tactical decision to proceed upon the sole claim relating to good time credit and deliberately withheld the cognizable claims in order to avoid dismissal. The gamble was that if unsuccessful in raising his one exhausted ground, he could later return again to federal court upon other grounds being simultaneously litigated in state court.

This conduct is clearly within the language of *Sanders* and *Fay* as abusive. It is advancing of grounds in a one-at-a-time fashion, "when the evidence is available which would allow all grounds to be heard and disposed of in one proceeding," that shows a calculated exploitation of the collateral attack process and is "intolerable abuse of the Great Writ." *Brager v. United States*, 539 F.2d 401 (5th Cir. 1978); *Fulford v. Smith*, 432 F.2d 1225, 1227 (5th Cir. 1970). *See also, Moore v. Estelle*, 526 F.2d 690 (5th Cir. 1976); *Johnson v. Massey*, 516 F.2d 1001 (5th Cir. 1975); *Jeulich v. United States*, 403 F.2d 523 (5th Cir. 1968).

The opinion below seems to hold that the federal and state systems of relief can be addressed as many times as a petitioner has claims, as long as the claims not presented to federal court, for whatever reason, have not yet been ruled upon or presented in the state courts. This

view ignores the fact that the state and federal courts are part of a single process designed to relieve a prisoner from unconstitutional detention and to bring a resolution to the entire case. *See, Galtieri v. Wainwright*, 582 F.2d 348, 359 (5th Cir. 1978)(en banc). The adjudication of claims is not an end in itself.

Paprskar has argued that because his good time claim in his first federal habeas application was a challenge to the *duration* of his confinement, and the other claims in his second federal application were a challenge to the *fact* of his confinement, he properly pursued the former before the latter. Upon examination, this distinction completely undermines Paprskar's position.

Clearly, he was bound to exhaust both sets of claims. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Paprskar had no reason whatsoever to rush to judgment on his good time claim. He burdened the federal district court with an evidentiary hearing, the Court of Appeals with an appeal, including briefing and oral argument, on a difficult claim, and this Court with a petition for writ of certiorari. Eventually he lost, and now it appears that he lost upon a claim that would never have been necessary to resolve if his instant constitutional claim were found to have merit. That is, a finding that Paprskar's conviction was constitutionally invalid, which he now seeks, would render the good time claim moot. Instead of waiting to see whether that might turn out to be the case, Paprskar pushed on to judgment, pursuing all these time-consuming and expensive proceedings.

It cannot be the law that Petitioner is entitled to abuse the judicial process in this manner. The opinion of the Court of Appeals states, "Respondent cites no case, nor has a search revealed any, that indicates that abuse of the writ exists in the circumstances involved here." 612 F.2d at 1007; A 8. Petitioner has now found a case precisely identical to this one--and the court reached the opposite result as the court below. In *Cody v. Missouri Board of Probation & Parole*, 468 F.Supp. 431 (W.D. Mo.

1979), the state prisoner brought a successive habeas petition raising grounds he had previously withheld because he had not yet exhausted his state remedies upon those claims. The court held as follows:

> As a practical matter, the problem of abuse may be avoided in all but the most exceptional cases if the petitioner simply refrains from filing any federal habeas corpus petition until he exhausts state remedies on *all* of the claims he may wish to present in his federal petition and, in the first federal petition, presents *all* available claims. Where the petitioner presents one exhausted claim in his first federal petition but waits to exhaust state remedies and present other claims to the federal court until after the first petition has been determined, he has, by definition, abused the writ of habeas corpus by attempting to litigate in piecemeal fashion claims that could have been presented earlier. See *Sanders v. United States*, *supra*, at 18, 83 S.Ct. 1068 (emphasis in original).

*Cody v. Missouri Board of Probation & Parole*, 468 F.Supp. 431, 435 (W.D.Mo. 1979). This holding is precisely the one advocted by Texas in and rejected by the court below. Interestingly, Cody also brought a jail time credit claim that the court held was not barred for abuse because the claim had not accrued at the time the first federal habeas petition was filed. *Id. All* Respondent Paprskar's claims had "accrued" when he filed his first federal application.

For these reasons, this petition should be granted, and Respondent Paprskar held in abuse of the writ.

## II. This Issue is one of Increasing National Importance.

Multiple habeas corpus petitions from a single state prisoner are a luxury that can no longer be afforded by the federal district courts. That the number of cases

filed by prisoners has increased dramatically in recent years has been well documented elsewhere.

For example, in *Carter v. Telectron, Inc.*, 452 F.Supp.944, 948-50 (S.D. Tex. 1977), Judge Carl O. Bue, Jr., collected statistical data proving the huge increases in prisoner litigation throughout the nation and particularly in the Southern District of Texas, which contains most units of the Texas Department of Corrections, presently housing more than 26,000 inmates. It is fair to say that the federal courts have been overwhelmed by such petitions. It is time to recognize the possibly harsh reality that justice will most effectively be served by liberalizing the abuse of the writ doctrine, if necessary, to embrace circumstances such as those presented in this case. It is simply unfair that some inmates such as Respondent should be given second, third, or fourth chances in federal habeas corpus while others, stuck behind the logjam that Respondent has helped to create, await their first.

This Court should accept this opportunity to vitalize and strengthen Rule 9(b) of the Habeas Corpus Rules and the abuse of the writ doctrine generally.

## CONCLUSION

For these reasons, Petitioner respectfully prays that this petition for writ of certiorari be granted, and that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed, and that Respondent Paprskar be held in abuse of the writ of habeas corpus.

Respectfully submitted,

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# APPENDIX

Michael J. PAPRSKAR,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 79-2170

United States Court of Appeals,
Fifth Circuit.

March 3, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, Chief Judge, FRANK M. JOHNSON, Jr., and POLITZ, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

On November 16, 1978, the United States District Court for the Southern District of Texas dismissed petitioner Michael J. Paprskar's second federal habeas corpus petition as a successive petition "abuse of the writ". The district court erred in making that determination. Accordingly, we vacate the judgment below and remand to the district court for further consideration of Paprskar's petition.

I.

This appeal marks Michael Paprskar's second appearance in this Court challenging his Texas conviction for murder or aspects of his confinement in the Texas penal system.[1] In his initial Section 2254

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[1]Paprskar was arrested in January, 1970, and charged with three murders. In June of that year he was tried and convicted in the state

petition, filed in December, 1975, petitioner alleged that state incarcerating authorities had unconstitutionally withheld credit for "good time" on thirty-nine months of pre-conviction detention.[2] Although the district court granted Paprskar's petition, this Court ultimately reversed. *Paprskar v. Estelle*, 566 F.2d 1277, 1281 (5th Cir.), *cert. denied*, 439 U.S. 843, 99 S.Ct. 136, 58 L.Ed.2d 142 (1978).

Paprskar and his family retained an attorney to replace the lawyer who had represented petitioner since his arrest in 1970. Over a period of time, however, the retained counsel failed to seek post-conviction relief in the state courts. In the meantime, Paprskar proceeded pro se on his first Section 2254 petition[3] and the federal district court appointed Attorney Maness, who represents Paprskar here, as counsel for petitioner in that action. Finally, in March, 1976, Paprskar's retained lawyer filed a state post-conviction action challenging petitioner's conviction. The state courts did

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courts for one of the murders and was sentenced to die in the electric chair. His appeal to the Texas Court of Criminal Appeals was successful and the conviction was reversed on the ground that evidence used to convict Paprskar was the fruit of an unreasonable search and seizure. *Paprskar v. State*, 484 S.W.2d 731 (Tex.Cr.App. 1972).

Following the state court's reversal of Paprskar's conviction, the Texas authorities charged him with the remaining two murders and dropped charges concerning the murder for which he was intitally convicted. On April 6, 1973, Paprskar pleaded guilty to the murders and was sentenced to two concurrent twenty-year sentences running from January 20, 1970, the date of the murders. Paprskar did not directly attack the convictions in the Texas courts. *See Paprskar v. Estelle*, 566 F.2d 1277, 1278-79 (5th Cir.), *cert. denied*, 439 U.S. 843, 99 S.Ct. 136, 58 L.Ed.2d 142 (1978).

[2]*See* note 1, *supra*.

[3]Paprskar's pro se application to the state courts was denied without hearing in 1974, thereby exhausting state remedies on his "good time" claim.

not dispose of the matter until November, 1976. Even this belated action by the retained counsel, however, was insufficient in that, directly contrary to Paprskar's wishes, that lawyer raised no claims of the ineffective assistance of petitioner's original attorney. Thereafter, Attorney Maness filed a state post-conviction action raising the ineffective assistance allegations.[4]

As these attempts at relief proceeded toward exhaustion in the Texas state court system, the federal district court granted Paprskar's "good time" petition. As noted above, however, this Court reversed and the Supreme Court ultimately denied certiorari.

After frustration of his attempt for good time relief, Paprskar on April 19, 1978, filed pro se[5] his second habeas corpus petition in the federal courts, the petition under consideration here. Unlike the earlier habeas corpus application, the second petition omitted any reference to conditions of Paprskar's confinement and instead challenged petitioner's conviction.[6]

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[4]The claim was exhausted in the Texas courts in October, 1977.

[5]Attorney Maness had earlier agreed to file the second federal petition. Because of delays no doubt at least partially the result of the time spent in preparation of a petition for certiorari to the United States Supreme Court in the "good time" case, Paprskar filed the second Section 2254 petition pro se.

[6]The second habeas corpus petition raised claims that:

(1) petitioner received ineffective assistance of counsel in derogation of his Sixth Amendment rights;

(2) Paprskar involuntarily entered a plea of guilty because his mental capacity was impaired due to drugs administered to him by his jailers;

(3) he was denied his Sixth Amendment right to speedy trial; and

(4) he was denied due process under the Fourteenth Amendment by the trial court's denial of his motion for discovery of a tape recording containing exculpatory material.

Respondent filed a motion to dismiss the second application, asserting that it was a "successive petition" within the purview of Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts (28 U.S.C. following §2254) and constituted an "abuse of the writ" because Paprskar "should have submitted in his initial federal habeas corpus application [the "good time" case] all of the issues" raised in the second petition.[7] The district court directed Paprskar to explain the reason the contentions raised in the second petition had not been asserted in the first application.[8] The case was then referred to the United States Magistrate who recommended that the district court dismiss the petition as "a classic case of abuse of the writ."[9] The district court followed that recommendation.[10]

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[7]The motion to dismiss the petition failed to mention that the courts of Texas did not complete action on the contentions raised in the second federal habeas petition until *after* the district court's final judgment in the "good time" case. Nor did the motion to dismiss refer to the fact that a large portion of the delay from which respondent alleged prejudice arose resulted from Paprskar's efforts to exhaust state remedies.

[8]Paprskar's explanation (prepared without benefit of counsel) in essence asserted ineffective assistance by all three of his attorneys. He failed to state that the claims could not have been raised earlier because his state remedies remained unexhausted.

[9]The Magistrate's "memorandum and recommendation" similarly omitted any reference to the problem of exhaustion of state remedies.

[10]Following the district court's dismissal of the petition, Mr. Maness, by now aware of the proceeding described above, timely filed notice of appeal. Later, Attorney Maness filed an application for certificate of probable cause and for leave to appeal in forma pauperis in which he attempted to explain that the exhaustion requirement had precluded Paprskar from raising the constitutional challenges to his conviction in the "good time" habeas corpus proceeding. Nevertheless, again on the recommendation of the Magistrate, the district court denied a certificate of probable cause and leave to proceed in forma pauperis. This Court, however, subsequently granted Paprskar's application for a certificate of probable cause and leave to appeal in forma pauperis.

II.

The district court dismissed Paprskar's second petition under the authority of the prohibition of Rule 9(b) against abuse of the writ. For that decision, respondent invites the imprimatur of this Court. We decline the invitation.

Rule 9(b) provides that:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

To determine whether given conduct constitutes abuse of the writ, however, reference to pre-Rule 9 case law is necessary. Rule 9(b) did not in any way change the standards that govern habeas corpus petitioners in the federal courts. Rather, the Rule restates principles that had previously been judicially developed.

The Supreme Court in *Sanders v. United States*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963) announced that "full consideration of the merits [of a habeas corpus petitioner's allegations] can be avoided only if there has been an abuse of the writ..." As enacted by Congress, Rule 9(b) codifies the standard of *Sanders*. Advisory Committee Note, Rule 9, Rules Governing Section 2254 Cases in the United States District Courts (28 U.S.C. following §2254); H.R.Rep.No.1471, 94th Cong., 2d Sess. 5-6, *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 2478, 2482, *Galtieri v. Wainwright*, 582 F.2d 348, 356 & n.18 (5th Cir. 1978)(en banc); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §4267 at 690-91 (1978).[11] When we examine

[11]Although the decision below was based on Rule 9(b) and the parties here have argued only whether that statute required

the conduct of petitioner[12] in light of the equities, *see Sanders, supra*, 373 U.S. at 17, 83 S.Ct. at 1078, we clearly cannot conclude that this petition constitutes "needless piecemeal litigation" or that its "purpose is to vex, harass, or delay." *Id.* at 18, 83 S.Ct. at 1078. There was here no abuse of the writ of habeas corpus.

The *Sanders* Court spoke of a circumstance in which abuse of the writ is present. "[I]f a prisoner *deliberately*

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dismissal of Paprskar's second Section 2254 petition, it is interesting to note 28 U.S.C. §2244(b). Section 2244(b) provides in relevant part that:

> a subsequent application for a writ of habeas corpus . . . need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise *abused the writ.*

28 U.S.C. §2244(b) (emphasis added). Like Rule 9(b) the provision has also been interpretted as a codification of the *Sanders* rule. 17 Wright, Miller & Cooper, *supra*, §4267 at 689-90; Statute Note, 45 Tex.L.Rev. 592, 593 (1967); *see* Historical and Revision Notes, 28 U.S.C. §2244. Nevertheless, it preceded by ten years the enactment of Rule 9(b).

[12]In the present case, respondent met the burden placed upon it by *Sanders* that it plead abuse of the writ. See *373 U.S. at 10-11, 83* S.Ct. at 1074-1075. Thereafter, under *Price v. Johnston*, 334 U.S. 226, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948), Paprskar was given the opportunity (and the burden) of "answering that allegation and of proving that he has not abused the writ." See Advisory Committee Note, Rule 9(b). Paprskar responded inadequately to the opportunity. *See* note 8, *supra*. However, when Mr. Maness learned of the difficulties Paprskar faced, he apprised the Court of the actual circumstances involved. *See* note 10, *supra*. Because the proper response to respondent's motion to dismiss was ultimately raised and because equities govern our consideration of the case, we examine the circumstances in the context of the response of Mr. Maness.

withholds one of two grounds for federal collateral relief at the time of filing his first application . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground." 373 U.S. at 18,83 S.Ct. at 1078 (emphasis added). However, from *Sanders'* incorporation of the standards of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) and *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, *see* 373 U.S. at 18, 83 S.Ct. at 1078 (1963), it is clear that such conduct will be an abuse of the writ only if due to "inexcusable neglect," *Townsend, supra*, 372 U.S. at 317, 83 S.Ct. at 759, or because of " 'an intentional relinquishment or abandonment of a known right or privilege," *Fay, supra*, 372 U.S. at 439, 83 S.Ct. at 849, *quoting Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). *See* 29 U.S.C. §2244(b); *Turnbow v. Beto*, 464 F.2d 527, 528 (5th Cir. 1972); *Galtieri, supra*, 582 F.2d at 368 (Goldberg, J., dissenting).

The *Sanders* Court recognized that "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, [or] to entertain collateral proceedings whose *only* purpose is to vex, harass, or delay." 373 U.S. at 18, 83 S.Ct. at 1078 (emphasis added). The *Sanders* ruling was based on the principle "that 'habeas corpus has traditionally been regarded as governed by equitable principles.' *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573, 73 S.Ct. 391, 397, 97 L.Ed. 549 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders, supra*, 373 U.S. at 17, 83 S.Ct. at 1078.

In the present case there was neither inexcusable neglect nor deliberate withholding of a ground for relief. *See Turnbow v. Beto, supra*. At the time the district court considered Paprskar's "good time" case, the allegations raised in his second federal petition, *see* note 6, *supra*, had not yet been finally acted on by the courts of Texas and therefore remained unexhausted.

The "good time" case, however, was ready to proceed toward resolution. As stated in our en banc decision in *Galtieri, supra*, 582 F.2d at 351, "[t]he rule in this circuit is that a federal district court generally must dismiss, without prejudice, a state prisoner's petition for writ of habeas corpus that contains a mixture of exhausted and unexhausted claims." Given that rule, we certainly can fault neither the district court for proceeding with the "good time" litigation nor Mr. Maness for not derailing resolution of claims concerning the conditions of petitioner's confinement until exhaustion in the state courts of challenges wholly unrelated to the facts and law involved in the "good time" case. The simple fact is that the "good time" case was ripe for adjudication and the claims challenging the underlying conviction were not. "The 'abuse of the Writ' doctrine is of rare and extraordinary application." *Simpson v. Wainwright*, 488 F.2d 494, 495 (5th Cir. 1973). Clearly, it is inapplicable where, as here, there was "some justifiable reason" for failure to raise the contentions in the first petition. *Price v. Johnston*, 334 U.S. 266, 291, 68 S.Ct. 1049, 1062, 92 L.Ed. 1356 (1948). Respondent cites no case, nor has a search revealed any, that indicates that abuse of the writ exists in the circumstances involved here.

Respondent argues that the forceful reiteration in *Galtieri* of the goal of "one federal proceeding embracing all claims," 582 F.2d at 357, requires us to find an abuse of the writ here. The argument, however, is inapposite.

First, as noted above, Rule 9(b) did not change the judicial interpretation of the abuse of the writ standard and no cases evidence that abuse of the writ occurred here. Even *Galtieri's* forceful statement of the goal of one habeas trip to the federal courts, of itself, would not require a finding of abuse here. Second, even if we were to view the *Galtieri* language as justifying a dismissal of Paprskar's second petition, we must recognize that at the time petitioner filed his second Section 2254 petition, *Galtieri* had not yet been decided by this Court

en banc. Indeed, the magistrate's recommendation of dismissal, accepted by the district court, that stated that Paprskar's actions constituted a "classic abuse of the writ" preceded by a few days the announcement of *Galtieri*. Last, although *Galtieri* recognizes the role of Rule 9(b) in achieving "the goal," the *Galtieri* court explicitly recognized that a petitioner could avoid Rule 9(b) dismissal of a second petition if the second petition asserts claims that were unexhausted at the time the first petition was brought. 582 F.2d at 358-59.

The circumstances involved here are not those of *Jones v. Wainwright*, 608 F.2d 180 (5th Cir. 1979), in which this Court had an opportunity to determine whether the possibility of a second habeas corpus petition alleging claims unexhausted at the time the first petition was brought would require that the first petition be dismissed *without* prejudice.[13] There, a dismissal would not "bar the federal courthouse door" to any of the claims of the petitioner. *See Galtieri, supra*, 582 F.2d at 355. Conversely, in the present case, if the district court decision is allowed to stand, Paprskar will

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[13]In *Jones*, the Court noted that "to the best of counsel's knowledge, [the unexhausted claims] will not be raised in the future[,]" 608 F.2d at 183, implying that an intention to raise the claims later might alter the Court's analysis. However, the Third Circuit has held that:

> It is no bar to federal adjudication of the merits of the present claim that a separate claim for relief on a different ground is pending in a state court.
>
> We recognize, as did the district court, the desirability, where circumstances permit, of including all grounds for habeas corpus in a single petition. But we think this does not outweigh the legitimate interest of a prisoner in obtaining prompt federal consideration of an adequate and properly asserted ground for relief that has been urged unsuccessfully before the state courts.

*United States ex. rel. Boyance v. Myers*, 372 F.2d 111,112 (3d Cir. 1967) (citation omitted).

be forever foreclosed from a federal forum in which to assert constitutional challenges to his conviction. Equity does not compel--indeed it cannot tolerate--such a result.

Although we vacate the order of the district court, we cannot at this juncture mandate that the court reach the merits of Paprskar's petition. In its motion to dismiss the petitioner, respondent alleged prejudice resulting from petitioner's delay in bringing the second petition. *See* note 7, *supra*. Rule 9(a) offers a laches defense to delayed petitions. In *Galtieri*, the Court specifically contemplated Rule 9(a) as the appropriate tool to help prevent unnecessary successive petitions asserting claims previously unexhausted. 582 F.2d at 358-59; *see id.* at 374 & n.12 (Goldberg, J., dissenting). The district court on remand should consider respondent's Rule 9(a) defense. We note, however, that "'[d]elay alone is no bar to federal habeas relief . . ..' " *United States ex rel. Barksdale v. Blackburn*, 610 F.2d 253, 260 (5th Cir. 1980) [*quoting Hamilton v. Watkins*, 436 F.2d 1323, 1326 (5th Cir. 1970)]. In order to prevail on a laches claim respondent must make a particularized showing of prejudice. *See Jackson v. Estelle*, 570 F.2d 546, 547 (5th Cir. 1978).

VACATED and REMANDED.

COLEMAN, Chief Judge, concurring.

I agree that *in the present state of habeas corpus law* the judgment of the District Court must be vacated and remanded. Nevertheless, I must make a few comments on this case.

On January 20, 1970, ten years ago, Paprskar and a companion killed three people because Paprskar thought he had been sold "bad heroin". One of those killed was a four year old child. The father of the child had just been killed when the malefactors unexpectedly discovered the presence of the child, in an automobile parked at the scene. They discussed the matter and

agreed that the child "had to be killed", which was done forthwith. A more deliberate, cold-blooded murder of an inoffensive child who hardly could have comprehended the danger he was in, or why he was in it, would be hard to imagine.

For the murder of the child, Paprskar was convicted and assessed the death penalty. This, however, was reversed because certain items seized as the result of a warrantless search had not been suppressed, *Paprskar v. State*, 484 S.W.2d 731 (Tex.Cr.App., 1972). Paprskar was never again tried for the murder of the child. Instead, represented by retained counsel, he was allowed to plead guilty to the indictments which charged the murder of the other two individuals and received concurrent sentences of twenty years. As a matter of ultimate fact, Paprskar was sentenced to twenty years for three murders.

He has been in prison for ten years. After unsuccessfuly filing several other petitions for habeas corpus he again seeks to invoke the Constitution, on grounds never before suggested, to void his pleas of guilty and to avoid an unusually mild sentence.

Of course, the Constitution is supreme and must be obeyed. I do not quarrel with that. I do find it to be painfully incongruous that he who defies all civilized notions of due process in the summary theft of a human life is allowed, years after the event and years after his conviction has become final, to raise all kinds of constitutional claims which, if they existed, could have been raised at trial, or at least, soon thereafter.

The fault, of course, is not with the Great Writ. It lies in the manner in which it is allowed belatedly to be invoked. While Congress has commendably made some effort to li it jurisdiction for the entertainment of these eleventh hour attacks on state court convictions it is readily apparent to one regularly dealing with the subject that those efforts have not met with much success.

Very few belated applications for habeas corpus claim that the petitioner is innocent. The fundamental purpose of the Writ has been distorted. The confidence of the general public in the ability of state courts to bring criminals to justice has been eroded. The deterrent effect of law prohibiting criminal conduct has been seriously damaged. The decisions say that the Writ may not be used as a second appeal, but from experience the outlaws know better. Instead of being a bulwark of freedom for the citizen it has been allowed to become a last, and too often a sure, refuge for those who have respected neither the law nor the Constitution.

I would not limit the Writ, if I could, but I most assuredly would limit its application in situations such as we encounter in this case.

As I do here, I must follow the law as it exists. I do not understand, however, that I am not allowed to mention serious defects in the law.

In this case it is a fact that Paprskar did plead guilty in two cases. On remand, I would like to direct the attention of the District Court (if that is necessary) to the following language in *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973):

> "[A] guilty plea represents a break in the chain of events which had preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [the trilogy]."

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL J. PAPRSKAR,<br>No. 231151,<br><br>Petitioner<br><br>VS.<br><br>W. J. ESTELLE, JR.,<br>Director, Texas Department<br>of Corrections,<br><br>Respondent. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Civil Action No. H-78-729 |

## FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this Court that this action should be and is hereby DISMISSED.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this *16th* day of *November*, 1978.

/s/ WOODROW SEAL

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
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| MICHAEL J. PAPRSKAR,<br>No. 231151,<br><br>Petitioner | §<br>§<br>§<br>§<br>§ | |
| VS. | § | Civil Action No. H-78-729 |
| W. J. ESTELLE, JR.,<br>Director, Texas Department<br>of Corrections,<br><br>Respondent. | §<br>§<br>§<br>§<br>§ | |

## ORDER

For the reasons set forth in the United States Magistrate's Memorandum and Recommendation, signed on October 18, 1978, it is ORDERED that said Recommendation be and the same is hereby adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED that Respondent's Motion to Dismiss is GRANTED, and Petitioner's cause is DISMISSED.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this *16th* day of *November*, 1978.

/s/ WOODROW SEAL

*UNITED STATES DISTRICT JUDGE*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHAEL J. PAPRSKAR,<br>No. 231151, | § | |
| Petitioner | § | |
| *VS.* | § | Civil Action No. H-78-729 |
| W. J. ESTELLE, JR.<br>Director, Texas Department<br>of Corrections, | § | |
| Respondent. | § | Judge Woodrow Seals |

## MEMORANDUM AND RECOMMENDATION:

Petitioner filed this petition pursuant to 28 U.S.C. 2254. On April 9, 1973, Petitioner pleaded guilty to two charges of murder with malice and was sentenced to two concurrent terms of twenty years.

Petitioner alleges the following:

1. Ineffective assistance of counsel in violation of the Sixth Amendment.

2. An involuntary plea of guilty resulting from the administration of drugs at the Tarrant and Harris County Jail rendering Petitioner mentally incompetent; thus, violating his right to due process under the Fourteenth Amendment.

3. Violation of his Sixth Amendment right to a speedy trial.

4. Violation of his Fourteenth Amendment right to due process because the trial court's denial of Petitioner's motion for discovery of tapes allegedly containing exculpatory material.

Respondent filed a motion seeking dismissal of this

cause for abuse of writ under rule 9(b) of the rules governing 28 U.S.C. § 2254. For the following reasons Respondent's motion to dismiss should be granted.

Petitioner has filed numberous habeas corpus petitions in both state and federal court. In particular, Petitioner previously filed a federal writ alleging denial of "good time" credits. That cause was decided against Petitioner by the Fifth Circuit on February 6, 1978. In that case Petitioner failed to raise any of the issues presented here. Rule 9(b) of the rules governing 28 U.S.C. § 2254 provides, that a "second or successive petition may be dismissed if . . . the judge finds that the failure of the Petitioner to assert those grounds in a prior petition constituted an abuse of the writ" 28 U.S.C. § 2254, Rule 9(b). The Fifth Circuit has held an abuse of writ to occur when a Petitioner is aware of all the issues and evidence, but deliberately fails to present all his claims at the same time and attempts to present such claims in a one-at-a-time, piece meal manner. *Fulford v. Smith*, 432 F.2d 1225, 1227 (5th Cir. 1976).

Once the abuse is alleged, the burden shifts to the Prisoner to show he has not abused the writ and the Court may not dismiss the petition without first giving the Petitioner the chance to meet his burden by giving him notice and ample opportunity to amend or explain. *Johnson v. Coppinger*, 450 F.2d 395 (4th Cir. 1969).

In a memorandum and order dated June 30, 1978, the District Court instructed Petitioner to show good cause why his petition should *not* be dismissed for abuse of writ pursuant to Rule 9(b). Petitioner's response alleged only ineffective assistance of counsel for his failure to raise the claims now being presented to this Court. *No* other explanation or excuse was given. An examination of Petitioner's first federal writ (Cause No. 75-H-2146) reveals that, in fact, Petitioner filed a *pro se* petition and the District Court awarded him the relief sought. This eliminates the possibility that counsel was responsible for the failure of Petitioner to raise all his claims at one

time. By the very nature of the claims now raised, Petitioner should have been or actually was aware of all the claims now being presented. Indeed, his response to this Court's Order shows no attempt to deny or adequately explain his failure to meet his burden. This is a classic case of abuse of the writ.

For the foregoing reasons the Magistrate RECOMMENDS that Respondent's Motion to Dismiss be granted, and Petitioner's cause be dismissed.

Done at Houston, Texas, this 30th day of October, 1978.

/s/

NORMAN W. BLACK
UNITED STATES
MAGISTRATE

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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No. 79-1891

---

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

MICHAEL J. PAPRSKAR,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Michael J. Paprskar, an inmate of the Texas Department of Corrections, respectfully moves pursuant to Rule 53 of the Court for leave to proceed in forma pauperis and to file the attached typewritten Brief in Opposition to the Petition for Certiorari in the above styled and numbered cause. The affidavit required by 28 U.S.C. section 1915 accompanies this motion.

Respectfully submitted,

MICHAEL ANTHONY MANESS
2260 Two Shell Plaza
Houston, Texas 77002
(713) 224-8900

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

MICHAEL J. PAPRSKAR,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

AFFIDAVIT IN SUPPORT OF THE MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Michael J. Paprskar, being first duly sworn according to law, depose and state in support of my motion for leave to proceed in forma pauperis that I am the Respondent in the above styled and numbered cause; that I am presently an inmate of the Texas Department of Corrections and am unable to pay the fees or costs of this proceeding or to give security therefor, and that I believe I am entitled to redress.

I am executing this affidavit pursuant to 28 U.S.C. section 1915 to accompany my Brief in Opposition to the petition for certiorari in this cause. The matters stated herein are true and correct.

Michael J. Paprskar

MICHAEL J. PAPRSKAR

THE STATE OF TEXAS

COUNTY OF WALKER

BEFORE ME, the undersigned authority, on this day personally appeared MICHAEL J. PAPRSKAR, who being by me first duly sworn deposed and stated under oath that he has signed the foregoing affidavit and that the matters stated therein are true and correct.

SUBSCRIBED TO AND SWORN BEFORE ME, a notary public, on this 16 day of June, 1980.

Richard Calgrove

NOTARY PUBLIC IN AND FOR
WALKER COUNTY, TEXAS

RECEIVED
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W. J. ESTELLE, JR., Director,
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Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

# RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL ANTHONY MANESS
2260 Two Shell Plaza
Houston, Texas 77002
(713) 224-8900

Counsel for Petitioner

June 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

MICHAEL J. PAPRSKAR,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Michael J. Paprskar, an inmate of the Texas Department of Corrections, respectfully suggests that the petition for a writ of certiorari in this cause, seeking review of a judgment of the United States Court of Appeals for the Fifth Circuit, should be denied.

## STATEMENT OF THE CASE

As the opinion of the Court of Appeals reveals, 612 F.2d 1003 (5 Cir., 1980), the Petitioner's hyperbolic characterization of this litigation as a "classic case of abusive piecemeal litigation by a state prisoner" is preposterous. The case in reality is no more than an unremarkable effort by a Federal habeas corpus petitioner to secure a hearing on substantial constitutional claims, a hearing thus far short-circuited by an unwarranted delay of more

than eighteen months as the result of a mechanical, impressionistic invocation of Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

What actually happened is simply stated. In December 1975 Paprskar filed a pro se Federal habeas corpus application in the Southern District of Texas, attacking not his conviction and 20-year sentence but an allegedly unconstitutional deprivation of "good time" credit for a substantial period of pretrial detention resulting from his successful appeal of a previous unconstitutional conviction and sentence of death. Paprskar v. State, 484 S.W.2d 731 (Tex.Cr.App., 1972). In January 1976 the District Court appointed Michael Maness under the provisions of the Criminal Justice Act of 1964, 18 U.S.C. section 3006A, to represent Paprskar in this "good time" case.

With the assistance of his family, Paprskar had previously retained another Houston attorney, Richard Prinz, to pursue State and Federal post-conviction remedies in connection with alleged constitutional defects in his conviction and sentence. However, it was not until March 1976, after substantial delay, that Mr. Prinz filed on Paprskar's behalf a State post-conviction application under Art. 11.07, Tex.C.Cr.P., asserting a number of claims but omitting a claim that Paprskar had expressly directed him to include -- that Paprskar's trial attorney had rendered constitutionally ineffective assistance of counsel. While this application languished in the State courts, the Federal District Court conducted an evidentiary hearing on Paprskar's "good time" claim and ultimately granted the relief sought in September 1976. One month later, the State convicting court denied the Prinz post-conviction application, but it was not until November 1977 -- more than one year later -- that the application was finally denied by the Court of Criminal Appeals of Texas, thereby exhausting State remedies on those claims Prinz had asserted on behalf of his client.

The State appealed the "good time" case to the Fifth Circuit. During the pendency of that appeal, in May 1977, Maness filed on Paprskar's behalf a second State post-conviction application, asserting the constitutional claim that Prinz had previously omitted and amplifying upon the others.[1/] This second post-conviction application was denied by the convicting court in July 1977 and by the Court of Criminal Appeals of Texas in September 1977.

In February 1978 the Fifth Circuit reversed the District Court's decision in the "good time" case. Paprskar v. Estelle, 566 F.2d 122 (5 Cir., 1978), cert. denied, 439 U.S. 843 (1978). While Maness was preparing and filing a petition for certiorari seeking review of this judgment,[2/] Paprskar filed in April 1978 a pro se Federal habeas corpus application containing essentially those claims alleged in the last State post-conviction application. Paprskar's pro se filing was attributable exclusively to the frustrations he had previously experienced when the inaction of counsel delayed his efforts to secure relief.

In its response in the second case the State asserted that this was a "second or successive petition" within the intendment of Rule 9(b) of the Rules Governing Section 2254 Cases in the

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1/ The claims were that (i) Paparskar's trial counsel had failed to render constitutionally effective assistance of counsel; (ii) a substantial factual basis for doubting Paprskar's mental competence to stand trial or to plead guilty was known to his lawyer, who failed either to apprise the trial court of those circumstances or to request a hearing on the question; (iii) trial counsel had refused to assert or argue a substantial claim that Paprskar's constitutional right to a speedy trial had been violated; (iv) trial counsel had acquiesced in open court to evidentiary stipulations that he knew to be factually untrue; and (v) trial counsel had permitted a "pre-plea" interview between Paprskar and the prosecutor, during which the prosecutor, in the presence of defense counsel, threatened and coerced Paprskar into pleading guilty, in part by misrepresentations of fact concerning the State's case that were materially untrue and that were known to be materially untrue by both the prosecutor and defense counsel.

2/ The Fifth Circuit's policy is to require counsel appointed under the Criminal Justice Act to prepare and file a petition for certiorari at the request of an indigent litigant if the issues for which review is sought are non-frivolous.

United States District Courts and constituted an abuse of the writ because Paprskar "should have submitted in his initial federal habeas corpus application [the "good time" case] all of the issues of which he is now complaining" (R. 15). The State did not advert even in passing to the circumstance that the Federal claims Paprskar "should have submitted in his initial federal habeas corpus application" were not decided adversely to him by the Texas trial and appellate courts until one year after the Federal District Court's decision in the "good time" case. In October 1978 the United States Magistrate, again without the slightest reference to the doctrine of exhaustion of state remedies, recommended to the District Court that the case be dismissed under Rule 9(b) on the theory that the Federal claims then before the Court should have been presented in the "good time" case and that "this is a classic case of abuse of the writ" (R. 53). The District Court followed this recommendation and dismissed the petition.

Upon learning of this dismissal, Mr. Maness prosecuted the appeal to the Fifth Circuit which has led to the filing of this petition for certiorari.

## REASONS FOR DENYING THE WRIT

This case stands as a pathetic testament to the procedural peccadillos and resultant delays an indigent Federal habeas corpus petitioner is likely to encounter in attempting to vindicate Federal constitutional rights. After being provided by a United States District Judge with a court-appointed lawyer who declines to assert unexhausted constitutional claims in Federal habeas corpus action No. 1, Paprskar is then curtly advised by the same United States District Judge in Federal habeas corpus action No. 2 that review of substantial constitutional issues is now forever foreclosed because Paprskar (who through the familiar fiction of attributing a lawyer's actions to his client has now somehow become personally

culpable) has failed to present those issues in the first proceeding -- and has thereby "abused the writ" -- notwithstanding the fact that such issues had not been resolved by the Texas courts until after the first habeas corpus action had been decided by the Federal District Court.

Certiorari should be denied because this is a frivolous petition, presenting no substantial question for review.

First, the opinion of the Court of Appeals is obviously correct. Rule 9(b) is little more than a codification of the holding of Sanders v. United States, 373 U.S. 1, 17-18 (1963) that a second application for post-conviction relief may be denied by a Federal District Court if a prisoner "deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason * * *" (emphasis added). Neither Sanders nor Rule 9(b) prescribes the rule for which the State is apparently contending: blind dismissal of every "second or successive" Federal habeas corpus application filed by a State prisoner, irrespective of the justification offered or the underlying facts of the case. Unless every such application is automatically to be characterized as an "abuse of the writ" and consigned to oblivion, a reasonable explanation for a failure to assert all constitutional claims in one Federal habeas corpus proceeding should continue to be sufficient to preclude the application of Rule 9(b). Such an explanation has, of course, been offered by Paparskar and accepted by the Court of Appeals in this case.

Secondly, the State's explanation for what Paprskar and his court-appointed counsel should have done in this case (i.e., dismissed the "good-time" case and awaited the exhaustion of state remedies on all other constitutional claims attacking the underlying conviction and sentence) is singularly unpersuasive. As the Court

of Appeals pointed out, "[t]he simple fact is that the 'good time' case was ripe for adjudication and the claims challenging the underlying conviction were not." 612 F.2d at 1006-1007. To adopt the State's position would be to establish an inflexible, unchallengable rule that would severely and unjustifiably cripple a United States District Court's ability to hear and decide those constitutional controversies that are ready to be decided and that ought to be decided.[3/]

Finally, even assuming that the State's interpretation of Rule 9(b) were to be accepted, its application to this case, in circumstances in which neither Paprskar nor his counsel had any reason to foresee that the withholding of unexhausted constitutional claims might later risk involuntary relinquishment of them, would plainly offend due process. Cf. Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964). The ultimate and unalterable fact of this case is that Paprskar and his counsel did not intend to abuse the writ of habeas corpus and could not reasonably have anticipated that the State would later contend that they did. That circumstance by itself is sufficient reason for not attempting to write a novel principle of Federal habeas corpus law into this proceeding.[4/]

It is supremely ironic that the State has sought to reinforce its view that the Federal Courts are being inundated by a flood of abusive, successive, frivolous prisoner petitions by referring to the example of Albert H. Cater (Petition for Certiorari,

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3/ The Fifth Circuit sitting en banc in Galtieri v. Wainwright, 582 F.2d 348(5 Cir., 1978) has already impliedly rejected the position now asserted by the State. 582 F.2d at 374 (dissenting opinion). This decision presumably accounts for the State's failure to seek rehearing en banc in this case, a tactical maneuver of the sort it is so quick to condemn in its petition for certiorari.

4/ The non-final character of the Fifth Circuit's judgment remanding the case is equally significant. See R. Stern & E. Gressman, Supreme Court Practice 300-302 (5th Ed., 1978).

Cody v. Missouri Board of Probation and Parole, 468 F. Supp. 431 (W.D. Mo. W.D., 1979), a case the State claims is "precisely identical to this one" (Petition for Certiorari, p. 9) is not. Cody "[waited] to exhaust state remedies and present other claims to the federal court until after the first petition had been determined * * *." 468 F. Supp. at 435. Paprskar did not.

p. 11). Properly characterized as "one who is unquestionably the most litigious prisoner in the Southern District of Texas," Carter v. Telectron, Inc., 452 F. Supp. 944, 946 (S.D. Tex., 1977), Carter's most recent of many Federal habeas corpus petitions was granted by a United States District Judge in Houston, who found that his retrial and conviction as an habitual criminal constituted double jeopardy because his initial conviction had been reversed for insufficiency of the evidence. See also Sellars v. Estelle, 450 F. Supp. 1262 (S.D. Tex., 1978), aff'd, 591 F.2d 1208 (5 Cir., 1979), rehearing denied, 594 F.2d 863, in which a "litigious" petitioner who spent 14 years in prison -- seven on Death Row -- for a crime he contended he did not commit was finally granted Federal habeas corpus relief because a police officer admitted his testimony at trial was perjurious and that a purportedly "voluntary" confession was the product of threatening the prisoner with death. These cases, which are by no means isolated, dramatically reveal the extent to which "second or successive" Federal habeas corpus petitions become, not an abuse of the writ, but an important and necessary vehicle for correcting violations of Federal constitutional rights that have previously gone unremedied. They also reveal the moral and intellectual bankruptcy of the State's position that "[m]ultiple habeas corpus petitions from a single state prisoner are a luxury than can no longer be afforded by the federal district courts" (Petition for Certiorari, p. 10).

## CONCLUSION

Respondent Michael J. Paprskar respectfully suggests that the petition for certiorari in this cause should be denied.

Respectfully submitted,

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